PETITIONERS' REPLY BRIEF.

Respondent at the beginning of its Brief has stressed the fact that certiorari has been sought on several prior instances in this case, the inference being that because certiorari has been refused before, it should be treated lightly and again refused. There is absolutely no basis for that inference. The refusal of certiorari by this Court has been held many times not to necessarily constitute an approval by this Court of the decision of the lower Court. There is real basis for this application and the fact that certiorari heretofore has been refused as to other phases of the case should not influence the Court in connection with the present application. Moreover just because the case has been before the Courts on numerous occasions is no reason for the refusal of certiorari. That this is true is shown by *Klapprott v. U. S.*, 335 U. S. 601 in which the petitioner had been before the Courts on many occasions from 1942 to 1948. It was not until 1948 that certiorari was granted, and when it was granted, the very same Court of Appeals—viz: for the Third Circuit,—as the one to which certiorari is now sought, was reversed. No weight therefore should be given to the inferences raised in Respondent's Brief in this respect.

The Court's attention is further called to the inaccuracy on page 4 of the Respondent's Brief where he states an appeal has been taken from Docket 10,015 of the Court of Appeals. Petitioners in their Brief (page 18) clearly state that no certiorari is sought as to 10,015.

Respondent in its Brief relies entirely upon the Answer filed by Judge Welsh to the Mandamus proceedings. The Court of Appeals in its decision did likewise. *But nowhere in the record certified by the District Court to the Court of Appeals and which was the only record under review by the Court of Appeals, is any reference to this answer to be found. The entire record of the District Court was certi-*

fied by the District Court to the Court of Appeals. The record certified by the District Court was in its Civil Proceeding No. 3047. The writ of mandamus referred to by appellee was filed in the Court of Appeals as of No. 8805, which is not involved in this appeal. The numbers of the proceeding in the Court of Appeals to which certiorari is now sought are 10,002 and 10,120—entirely different from No. 8805. It is thus clear that the mandamus proceedings are not part of the record in the proceedings that were before the Court of Appeals and is now before this Court. The mere fact that Respondent may have attached a copy of the alleged Answer to its paper book before the Court of Appeals did not make it a part of the official record. The District Court certified the entire official record to the Court of Appeals and that is what the Court of Appeals had to consider (Rule 75, Rules of Civil Procedure). Respondent made no objection to the record as certified. The Court of Appeals had no right to rely on something not a part of the record certified to it by the lower Court or to take it into consideration in reviewing the matter then before it.

Practically all the alleged facts set forth on pages 2 and 3 of Appellee's Brief, with the exception of the last paragraph on page 3, are not relevant to this application. They were no part of the District Court record that was being reviewed by the Court of Appeals from whose action this certiorari is requested. They are therefore not relevant and should not be considered by the Court in this application. Respondent has based its entire argument on matters not a part of the record of the District Court which record is all the Court of Appeals must consider on the appeal.

If (assuming just for the purpose of this argument, but not conceding the correctness thereof), it was correct for the Court of Appeals to consider the Answer filed by Judge Welsh in the mandamus proceedings in the Court of Appeals, it would also be proper for the Court of Appeals to consider the fact that Judge Welsh on several occasions

since has stated from the bench that he was of the opinion a new trial should be granted.

The Court's attention is also called to the fact that the record of the District Court before the Court of Appeals at the time of the appeal, did not contain any notation that the matter had been marked to the use of any one. This matter was not marked to the use at the time of or prior to the decision of the Court of Appeals. It, therefore, was not part of the record of the District Court under review to which the Court of Appeals was restricted and beyond which it had no right to go. It, therefore, is no part of this case.

All of Appellee's arguments are statements as to matters not in the record, and your appellants feel that they are only advanced in hope they will befog the issue and confuse your Honorable Court. Appellants feel your Honorable Court will not permit this to happen, but will decide the issues in this case on the basis of the record as certified by the District Court.

There is therefore before the Court a question of substance and of basic and fundamental importance—to wit: whether a court of appeals is not bound to decide a case on the basis of the record as certified to it by the lower Court.

Petitioners submit that a certiorari should be granted in this matter for the additional reasons that not only is there a conflict of circuits on the question as to whether a second judge of coordinate jurisdiction with another judge in a matter has the right to act in the first judge's matter without his consent, but also that the order entered by Judge Kirkpatrick failed to vacate the action of Judge Welsh, merely dismissing all motions for new trial when there was no pending motion for new trial before the Court.

A. D. Bruce,
Edwin Hall, 2nd,
Harry J. Alker, Jr.,
Attorneys for Petitioners.